

RD-260



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House of Representatives

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November 6, 1991

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

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Opinion Committee

Dear General Morales:

One of my constituents recently contacted me regarding a concern which I believe could be addressed by an Attorney General's opinion.

At this time, I would like to request an opinion on the following matter. The City of League City wishes to implement a city drug free policy but is concerned about the effects of Attorney General Opinion #JM-1274 on the implementation of such a policy. The City has requested a second opinion regarding drug testing as it relates to a drug free workplace. Attached please find copies of Attorney General Opinion #JM-1274 and the proposed City drug free policy.

I thank you in advance for your prompt attention to this matter. If you have questions or comments regarding this request, please do not hesitate to contact me.

Yours very truly,

James F. Hury, Jr.

cc: Mr. Mark T. Sokolow, City Attorney
City of League City

JFH/als

ACCOMPANIED BY ENCLOSURES —
FILED SEPARATELY

Citation
Opinion No. JM-1274

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December 27, 1990

Honorable Jimmie McCullough
County and District Attorney
82nd Judicial District
Robertson County
P.O. Box 409
Franklin, Texas 77856

Re: Authority of a sheriff to require his employees to submit to random drug testing (RQ-1952)

Dear Mr. McCullough:

You have requested our opinion regarding the authority of a sheriff's department to require its deputies and jailers to submit to random drug testing by means of urine samples.

Drug testing of governmental employees and others similarly situated has been the subject of frequent litigation in the federal courts in recent years, and no consensus has yet emerged on the permissible limitations which a governmental body may place on its employees' Fourth Amendment protection against unreasonable searches and seizures. In *Skinner v. Railway Labor Executives' Ass'n*, 109 S.Ct. 1402 (1989), the Supreme Court, in a 7-2 decision, upheld the Federal Railroad Administration regulations that required blood and urine tests for certain railroad employees following major train accidents or other "incidents." In *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989), the Supreme Court, in a 5-4 decision, upheld urine testing of employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms. Neither of these Supreme Court decisions involved the kind of random urine testing for drugs about which you inquire. For purposes of this opinion, we assume that "random" testing refers to urinalysis that is not occasioned or triggered by any incident or event, such as alleged criminal activity, an accident, or a complaint filed by a member of the public that casts suspicion on one or a group of deputy sheriffs or jailers.

The lower federal appellate courts have considered random urine testing but are divided in their conclusions. In *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir.), vacated, 862 F.2d 567 (6th Cir.1988), the court of appeals for the sixth circuit invalidated the city of Chattanooga's mandatory urinalysis testing of police officers on a department-wide basis without reasonable cause or suspicion of individuals. By contrast, the court of appeals for the third circuit upheld random drug testing of police officers in the Township of Washington, New Jersey. *Policeman's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133 (3rd Cir.1988). Likewise, the court of appeals for the first circuit, in *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), cert. denied, 110 U.S. 404 (1989), upheld random drug testing by the Boston Police Department of all officers carrying firearms or participating in drug

(E.D.Mich.1989); *Weicks v. New Orleans Police Dep't*, 706 F.Supp. 453 (E.D.La.1988).

Although there seems to be a trend in the lower federal appellate courts to approve **random urine testing** of police officers, the Supreme Court has not yet upheld **random testing** of any kind, and the narrowness of the margin which the majority was able to muster in *Von Raab* does not inspire complete confidence that the Court will necessarily follow the rulings in *Township of Washington and Guiney*. We need not address the issue of **random testing** under the federal Constitution, however, since we believe that the Texas Constitution prohibits the practice.

In *Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation* [hereafter TSEU], 746 S.W.2d 203 (Tex.1987), the Texas Supreme Court affirmed the right of privacy under the Texas Constitution, as deriving, *inter alia*, from article I, section 9, which protects the right of an individual to be "secure . . . from all unreasonable seizures or searches," the same prohibition as appears in the Fourth Amendment to the federal Constitution. The court, declaring that the Texas Constitution protects one's personal privacy from unreasonable intrusion, held that the right of privacy can

yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means. *Id.* at 205.

In TSEU, the court said that a policy of the Department of Mental Health and Mental Retardation which required employees to submit to polygraph examinations in certain instances [FN1] was an unwarranted "intrusion" and therefore violative of the employee's right of privacy. The intrusiveness of **urine testing** is of a somewhat different nature from that of a polygraph examination, but in our opinion, the former is at least as intrusive as the latter. The chemical analysis of urine "can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic." *Skinner*, *supra*, at 1413. Furthermore, the very

process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.

Id. In concluding that **urine testing** "intrudes upon expectations of privacy that society has long recognized," the Court quoted the court of appeals for the fifth circuit in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir.1987):

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Skinner, *supra*, at 1413.

We believe that the Texas Supreme Court would likewise conclude that the collection and **testing** of urine implicates privacy interests protected by the Texas Constitution, and that as a result, a governmental body, in order to require it, must pass the two-pronged test of TSEU: it must demonstrate that (1) the intrusion is warranted to achieve a compelling governmental objective;

and (2) that objective cannot be achieved by less intrusive, more reasonable means.

In TSEU, the court found that the department's objectives were not sufficiently compelling to warrant the intrusion. The department's objectives were, however, quite specific:

The polygraph testing was initiated to assist administrators in investigations of four types of situations: patient abuse or neglect; conduct endangering the health or safety of patients or other employees; theft or other criminal activity; use of **drugs** or alcohol.

TSEU, supra, at 206.

In the situation you pose, no objectives whatsoever have been stated. Since the polygraph examination in TSEU was struck down even when the goals of testing were specific, we believe that, at a minimum, a sheriff's department must have specific demonstrable goals that cannot be achieved by less intrusive, more reasonable means before it can constitutionally require urine testing. As the test you inquire about does not comply with either prong of the TSEU test, neither would it comply with article I, section 9, of the Texas Constitution.

SUMMARY

The Texas constitutional guarantee of privacy would be violated by **random** urine testing of deputy sheriffs and jailers for the presence of **drugs** where no compelling governmental objective for the testing has been shown.

Very truly yours,

JIM MATTOX

Attorney General of Texas

MARY KELLER

First Assistant Attorney General

LOU MCCREARY

Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY

Special Assistant Attorney General

RENEA HICKS

Special Assistant Attorney General

RICK GILPIN

Chairman, Opinion Committee

Prepared by Rick Gilpin

Assistant Attorney General

FN1. Under the written policy, an employee could be dismissed for refusing to submit to a polygraph examination only if there existed reasonable cause to believe that (1) an incident of patient abuse or illegal on-campus activity had occurred; (2) an employee had violated departmental rules in connection therewith; and (3) all other reasonable investigatory alternatives had been exhausted including, at a minimum, an interview with the employee. In addition, there were restrictions on the administration of the examination itself.

Opinion No. JM-1274

END OF DOCUMENT

ORDINANCE #91-84
EXHIBIT "A"

DRUG FREE WORKPLACE POLICY

Article I
PURPOSE AND SCOPE

1.01 The City of League City is committed to providing a work environment which is free from the effects of the use of drugs and alcohol as defined herein (Article II, Sections 2.02 and 2.03). In this regard, the City is adopting a policy designed to eliminate the use of drugs and alcohol and their effects in the workplace, so as to better provide for the general health and safety of its employees. Pursuant to the City's commitment, the City has adopted this Policy known as the Drug Free Workplace Policy.

Article II
DEFINITIONS

2.01 "City" is defined herein as the City of League City. The City may act through its elected officials, management, supervisors, officers and directors, unless otherwise specified.

2.02 "Drugs" is defined herein as a controlled substance as defined in Schedules I through V of Act 21 U.S.C., Section 802 and Section 812 (Federal Controlled Substances Act), Schedules I through V of Chapter 481 of the Texas Controlled Substances Act, and other illegal drugs, inhalants, and prescription drugs (except when taken as directed by the employee's physician).

2.03 "Alcohol" is defined herein as any alcoholic or ethanol based substance or beverage, including, but not limited to, liquor, beer, and wine.

2.04 "Authorized Use of Alcohol" is defined herein as the possession and use of alcoholic beverage(s), such as liquor, beer, or wine, that has been approved by the City for a particular event(s) or time period, not to exceed legal limits as determined by federal and state laws.

2.05 "Drug Paraphernalia" is defined herein as equipment, a product, or material that is used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, or concealing drugs or in injecting, ingesting, inhaling, or otherwise introducing drugs into the human body.

2.06 "Drug Test" and "Drug Testing" are defined herein as any authorized test, or combination of tests or associated procedures, conducted to determine the use of drugs and/or alcohol.

2.07 "Employee" is defined herein as any person working in a full-time, part-time, seasonal or probationary capacity for the City including, but not limited to, the individual whose name is printed on the last page of this Policy.

2.08 "Exhibiting the Characteristics of Using Drugs and/or Alcohol" is defined herein as an employee who is exhibiting symptoms, conduct or behavior which appears to be related to or the result of the use of drugs or alcohol.

Employee initials _____

- 2.09 "Intoxicated" is defined herein as the appearance of not having the normal use of mental or physical faculties by reason of exhibiting characteristics or symptoms that may be related to or the result of the use of drugs or alcohol.
- 2.10 "Policy" is defined herein as the Drug Free Workplace Policy adopted by the City and set forth in this document.
- 2.11 "Possession" is defined herein as the owning, holding, or controlling of drugs or alcohol on an employee's person, on an employee's property brought onto City premises, or on City property used by the employee.
- 2.12 "Premises" is defined herein as City owned land and the buildings upon it including, but not limited to, City owned vehicles.
- 2.13 "Safety Sensitive" is defined herein as any job held by an employee which has been designated by the City as a safety-sensitive position. (A list of jobs considered safety sensitive is available from the Director of Administrative Services.)
- 2.14 "Seasonal Employment" is defined herein as any job which is limited by its description to a specific time of the year (such as lifeguards). A list of jobs which qualify as seasonal employment is available from the Director of Administrative Services.
- 2.15 "Witnessed Void" is defined herein as having a person who is providing a urine specimen observed by a laboratory staff member of the same gender during the actual process of expelling and collecting the urine.

Article III

POLICY STATEMENT

3.01 It is the policy of the City to prohibit the use, sale, dispensing, possession, or manufacture of drugs, alcohol or drug paraphernalia on its premises, or while an employee is away from City premises but is on City business (except for authorized use of alcohol). Employment and continuing employment with the City is expressly conditioned upon each employee's strict adherence to this Policy. Violation of any provision of this Policy by an employee may result in termination of that employee's employment. Any employee who refuses to consent and cooperate with drug testing as outlined in this Policy is in violation of this Policy. Any employee who uses drugs or alcohol on City premises, or while away from City premises but on City business is in violation of this Policy. Any employee who is drug tested and whose test result is positive for the use of drugs or alcohol is in violation of this Policy. Any employee who refuses to consent to and cooperate with inspections as outlined in this Policy is in violation of this Policy. Any employee found to be in possession of drugs, alcohol, or drug paraphernalia while on City premises or while away from City premises, but on City business, is in violation of this Policy. Refusal to follow and cooperate with any aspect of this Policy by a City employee is a violation of this Policy.

Article IV
REQUIRED TESTING FOR DRUGS AND/OR ALCOHOL

4.01 The City's Director of Administrative Services may require that a test for the presence of drugs be conducted:

- a. when a person is conditionally offered employment;
- b. when an employee exhibits behavior or characteristics which appear to be related to or the result of the use of drugs or alcohol;
- c. on a random or group basis; and
- d. when an employee is involved in an injury or accident while at work, either on the City premises or while away from the premises on City business.

4.02 A test or tests for the presence of alcohol may be performed when an employee exhibits behavior or characteristics which appear to be related to or the result of the use of alcohol, or when an employee is involved in an injury or accident while at work, either on the City premises or while away from the premises on City business.

Article V
LABORATORY/COLLECTION PROCEDURES

5.01 Drug tests will be conducted at testing facilities selected by the City. The tests will be paid for by the City.

5.02 Urine samples will be collected by a qualified, experienced company capable of implementing the objectives of this Policy and which maintains a minimum of \$1,000,000 (one million) liability insurance.

5.03 Witnessed voids will be conducted when the collection/testing facility staff request a witnessed void.

5.04 Urine samples will be analyzed by a National Institute on Drug Abuse (NIDA) certified laboratory which maintains a minimum of \$1,000,000 (one million) liability insurance.

5.05 Urine samples shall be tested by the EMIT method and if determined positive the sample shall be confirmed by a GC/MS test (gas chromatography mass spectrometry).

5.06 Urine samples which yield a positive drug test result shall be maintained in a frozen state by the laboratory for a period of one year as to allow retesting of the sample if the City considers it appropriate or if the employee pays for the costs thereof.

5.07 Test results will be reviewed by a Medical Review Officer who shall inform the Director of Administrative Services of the results of the drug test both verbally and in writing.

5.08 Written confirmation will be sent to the Director of Administrative Services for both positive and negative test results.

Employee initials _____

09 The employee whose test results are positive for the use of drugs or
c 1 shall have the right to obtain copies of the chain of custody and test
suit analyses upon written request.

10 Urine samples which are challenged or re-tested for any reason may be
plit and sent to another laboratory for a second confirmation test upon written
quest by the employee.

Article VI PRE-PLACEMENT APPLICANT NOTIFICATION

01 Pre-placement drug testing is effective November 1, 1991.

02 All persons applying for employment with the City will be made aware that
ne City has a Drug Free Workplace Policy and that employment at the City is
expressly conditioned upon the applicant agreeing to all provisions of the Policy
nd passing a test for drugs.

03 Pre-placement applicants who have satisfied the qualifying criteria for
employment may be made a Conditional Offer of Employment in accordance with
Article VIII of this Policy and asked to sign the necessary forms for a test for
drugs and/or alcohol to be conducted and the test results released to the City.
pplicants refusing to sign the Policy and the consent forms are not eligible for
employment with the City.

Article VII EMPLOYEE NOTIFICATION

01 All current employees must be notified, both verbally and in writing, of
his Policy at the time of program implementation. All current employees will be
iven at least thirty (30) days notice prior to actual implementation of the
olicy and any testing (except for random and group testing as designated in
ection 7.02 of this Article.)

02 Random and group testing will be effective May 1, 1992. No random or
roup drug tests will be conducted prior to this date.

03 Each employee must receive a copy of this Policy and sign a copy of this
olicy along with the following forms:

- a. Drug and alcohol test consent and information release form
- b. General records release authorization
- c. Inspection consent form

04 All signed employee Policy and consent forms should be filed in both the
ersonnel file and the confidential drug test file of the employee.

05 All employees shall be provided a written copy of this Policy on or before
he first day of employment, or within thirty (30) days after the date this
olicy is adopted by the City, whichever is later.

Employee initials _____

9.04 Any employee required to be tested for the presence of drugs and/or alcohol in accordance with this Article, may (at the employee's request) have a medical examination performed on him or her. However, an employee's request for a medical examination shall not interfere with or delay the test for drugs and/or alcohol. The City is not responsible for the cost of any employee-requested medical examination that is conducted in conjunction with or subsequent to a drug test taken in accordance with this Section.

9.05 After the City receives the results of the test for drugs and/or alcohol, the employee will be notified of the results and any action, if applicable, to be taken by the City in accordance with this Policy.

Article X **RANDOM/GROUP DRUG TESTS**

10.01 The Director of Administrative Services may require that employees be subject to random or group drug testing from time to time.

10.02 Employees in safety sensitive jobs may be subject to random or group drug testing on a routine basis, as determined by the Director of Administrative Services.

Article XI **ACCIDENT/INJURY DRUG TESTS**

11.01 Any employee involved in an accident or injury while at work, may be required to undergo a test for drugs and alcohol when:

- a. the City decides that the employee involved in the accident or injury required medical attention; or
- b. the City decides that the potential health or safety of the employee involved in the accident or injury may be at risk; or
- c. the City decides that the employee was possibly involved in the accident or injury.

Article XII **REFUSING A REQUESTED TEST FOR DRUGS AND/OR ALCOHOL**

12.01 Any employee who refuses to undergo and cooperate with a requested test for drugs and/or alcohol in accordance with any provision of the Policy shall be subject to disciplinary procedures up to and including termination from employment with the City.

12.02 When an employee refuses a requested test for drugs and/or alcohol, the City Administrator or his designee shall conduct a hearing to determine the appropriate disciplinary action, if any, to take.

Article XIII
**CONSEQUENCES OF VIOLATIONS DUE TO A POSITIVE
DRUG AND/OR ALCOHOL TEST RESULT**

13.01 In the event an employee's drug and/or alcohol test results are positive for the presence of drugs and/or alcohol, the employee shall be subject to disciplinary procedures up to and including termination from employment with the City (See Disciplinary Procedures, Article XIV.)

Article XIV
**DISCIPLINARY PROCEDURES FOR
CONSEQUENCES OF VIOLATIONS DUE TO A POSITIVE DRUG OR ALCOHOL TEST RESULT**

14.01 When an employee tests positive for the use of drugs or alcohol, the City Administrator or his designee shall conduct a hearing to determine the appropriate disciplinary action, if any, to take.

Article XV
INSPECTIONS

15.01 Employment with the City is expressly conditioned upon the City's right to conduct inspections for the possession of drugs, alcohol, or drug paraphernalia at anytime the employee is on City time, on City business, or on City premises.

15.02 No inspection shall be conducted without the authorization of the Director of Administrative Services.

15.03 Any employee who refuses to give consent to and cooperate with an inspection pursuant to paragraph 15.01, shall be subject to disciplinary action up to and including termination from employment with the City.

15.04 Any employee found to be in possession of drugs, alcohol, or drug paraphernalia shall be subject to disciplinary action up to and including termination from employment with the City.

15.05 When an employee is found to be in possession of drugs, alcohol or drug paraphernalia, the City Administrator or his designee shall conduct a hearing to determine the appropriate disciplinary action, if any, to take.

Article XVI
RE-APPLICATION FOR EMPLOYMENT

16.01 Once an employee's employment has been terminated due to violation of this Policy, the former employee will not be eligible for re-employment at the City for one (1) year.

Article XVII
DRUG AND ALCOHOL AWARENESS EMPLOYEE HANDOUT

17.01 Employee awareness of the dangers that drug and alcohol use pose to employee health and safety, City property and the business of the City, is critical to achieving a Drug Free Workplace. Toward this end, information will

Employee initials_____

be made available concerning these dangers in an Employee Drug and Alcohol Awareness Handout distributed at the time of Policy implementation and upon request from the City Drug Program Administrator.

Article XVIII
EMPLOYEE ASSISTANCE PROGRAM

18.01 An Employee Assistance Program ("EAP") has been adopted and implemented by the City to offer assistance to employees and their families.

Article XIX
ENTERING A TREATMENT PROGRAM

19.01 A list of area drug and alcohol education and treatment programs will be made available to all employees in their Employee Drug and Alcohol Awareness Handout at the time of Policy implementation and upon request from the City Personnel Department.

Article XX
CONFIDENTIALITY OF RECORDS AND INFORMATION

20.01 The records, test results and all other information regarding this Policy shall not be filed in an employee's personnel files (with the exception of the signed Policy and consent/acknowledgement forms associated with the Policy). They are on record only at the City's designated testing facility and in a separate, locked file at the City. Access to this file, and copies of documentation in the file, is limited only to:

- a. Medical Review Officer
- b. City Attorney
- c. City Administrator
- d. Director of Administrative Services/Drug Program Administrator

20.02 City employees authorized to have access to this confidential file shall not communicate any of the information contained in the file to any person who is not authorized by the City Administrator, City Attorney, Director of Administrative Services or by law to receive it.

20.03 Supervisory management may participate in meetings concerning disciplinary action or termination procedures which affect the employees that same management is responsible for supervising.

20.04 The employee whose test results are positive for the use of drugs or alcohol may, upon written request, obtain copies of the chain of custody and test result analyses of his or her records.

20.05 Unauthorized disclosure of confidential information shall subject the individual making the unauthorized disclosure to disciplinary procedures, up to and including termination of employment with the City.

Article XXI
POLICY VIOLATION NOTIFICATIONS

21.01 Each employee has the responsibility of reporting accidents, injuries or Policy violations to the City immediately, whether the employee is a direct participant, a witness, or involved in any way whatsoever with the incident.

21.02 The City maintains the right to act in accordance with this Policy at the time any violation or incident is brought to the City's attention. Delays in reporting violations or incidents to the City in no way impedes the City's right to act in accordance with this Policy.

Article XXII
FEDERAL AGENCY NOTIFICATIONS

22.01 In accordance with the Drug Free Workplace Act of 1988, all employees must notify the City of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction. This means that if an employee is convicted of a criminal drug statute for a violation occurring while the employee is on City time, City business or City premises, the employee must notify the City no later than five (5) days after such conviction.

22.02 The City must notify any applicable contracting federal agency within ten (10) days after receiving notice of a criminal drug statute conviction pursuant to paragraph 22.01 of this Policy, from an employee or otherwise receiving actual notice of such conviction.

Article XXIII
NOTICES/POLICY ACCESSIBILITY

23.01 A Notice for Drugs and Alcohol Testing will be posted on bulletin boards, in employment offices and in other appropriate locations as determined by the City.

23.02 A copy of the Policy will be maintained in an accessible location for employee reference purposes.

Article XXIV
POLICY ADMINISTRATION

24.01 The Policy is administered by the Mayor and designated management personnel who shall be responsible for implementation, management, and any procedure inherent in this Policy.

24.02 The Drug Program Administrator (Director of Administrative Services) will act as coordinator with management, supervisory personnel, employees, the designated laboratory, and the Medical Review Officer.

Article XXVI
REFERENCES

25.01 References attached: Federal Drug Free Workplace Act, Texas Controlled Substances Act, Texas Workers Compensation Commission Final Rule, Texas Register, April 5, 1991.

Employee initials_____

I have received a copy of the City of League City's Drug Free Workplace Policy. I have read the Policy and I understand it. I have been given a copy of the City's Employee Drug Awareness Handout in accordance with Section 17.01 of the Policy.

Employee Name [PLEASE PRINT]

Employee Signature

Date

Social Security Number